

INTERVIEWING AND SELECTING ARBITRATORS



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The monthly arbitration column from King & Spalding's Doak Bishop, Craig Miles and Roberto Aguirre Luzi turns to the most important decision to make before arbitration: choosing an arbitrator

Nothing is more fundamental to a successful arbitration than the arbitrators in whom the parties place their trust. Choosing arbitrators is a critical phase of the process. Indeed, the ability to participate in the selection of your own arbitrator is a distinguishing feature of arbitration. Standards for the appointment and disqualification of arbitrators may be found not only in the applicable arbitral rules selected by the parties and in the local arbitration laws of the place where the tribunal will sit, but also in the International Bar Association's (IBA) guidelines on conflicts of interest in international arbitration, and in the American Bar Association's American Arbitration Association (AAA) code of ethics for arbitrators in commercial disputes.

The appointment of arbitrators

The first step in the selection process is to review the arbitration agreement to determine the number of arbitrators to be selected and the procedures governing their appointment. The agreement itself may spell out the number of arbitrators, the selection criteria or, in rare instances, even designate an arbitrator by name. More frequently, the parties' agreement will incorporate the arbitral rules of an institution such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or other sets of international rules like the Santiago Arbitration and Mediation Center (Santiago CAM) sponsored by the Santiago Chamber of Commerce, or similar bodies in other cities.

In cases concerning an arbitral tribunal rather than a sole arbitrator, the most common method of selecting tribunal members is for each party to select one arbitrator with the two party-appointed arbitrators then selecting a third person to serve as the presiding arbitrator or chairman. When parties are unable or unwilling to designate their nominees within a specified

time, the rules frequently contain a default provision by which the arbitral institution itself will nominate an arbitrator on a party's behalf. The ICC rules, for example, provide that the ICC will appoint a sole arbitrator if the parties fail to nominate someone within 30 days of the opposing party's receipt of the claimant's request for arbitration. The court will also appoint an arbitrator to serve as a member of a tribunal when a party fails to do so, and when necessary a third arbitrator to act as chairman of the tribunal.

The second step is to review the arbitration laws of the place where the tribunal will sit. This is of particular relevance for Latin America, because in some countries, like Chile, there are still some restrictions regarding the nationality of the members of the tribunals, although they more commonly apply only to domestic rather than international arbitrations.

The rules of appointment of arbitral associations are straightforward and easy to follow, but parties should pay close attention to the procedural requirements and deadlines.

Criteria for appointment: independence and impartiality

Most international arbitration rules expressly require arbitrators to be 'impartial' and 'independent'. The LCIA, UNCITRAL and AAA arbitral rules, among others, all require arbitrators to be impartial and independent, although the ICC rules specify independence only. The same can be said about the rules of other Latin American arbitration and mediation centres like the Santiago CAM. Whatever the precise terminology of the rules, parties should look for arbitrators who satisfy both tests.

The terms 'impartiality' and 'independence' are often confused, but they are not synonymous in the arbitration context. The concept of independence addresses the personal and professional relations between a candidate and the parties, counsel, witnesses and other arbitrators. Except in rare circumstances, a candidate

must be independent of the parties, meaning he can have neither a substantial business relationship with the parties or its representatives nor a financial interest in the arbitration's outcome.

Impartiality, by contrast, is a subjective concept that focuses more on the subject matter of the controversy rather than on the relationship of the arbitrator to the parties or other relevant persons. The IBA guidelines provide that justifiable doubts exist as to impartiality if an objective third party would conclude that there is "a likelihood that the arbitrator may be influenced by factors other than the merits of the case" in reaching a decision. The requirement of impartiality means an arbitrator must be open-minded regarding the subject matter of the dispute and willing to decide the case on its merits rather than for reasons of bias for one party or prejudice against another.

There are limits, however, as to how far even the concept of impartiality can be taken. Impartiality does not preclude shared values, experiences, jurisprudential background, or even a starting predisposition in favour of the nominating party so long as the candidate remains open-minded and is able to act in good faith in overseeing the arbitration, examining the facts and applying the law. Nor does it require a party to nominate a stranger. It is accepted that a party will propose or select a candidate because he hopes that that person will look favourably on his position, and there is certainly no prohibition in him doing so.

It is an entirely different matter, however, to take steps to convert what amounts to hope for a sympathetic audience to an advance assurance that the arbitrator will support the party's position on the merits. Such actions are likely to be counter-productive in any event because biased arbitrators are often ineffective. Other tribunal members perceive such persons as advocates rather than as impartial judges and may discount their views accordingly. The presiding arbitrator, whose vote on a three-

person tribunal is often critical and whose impartiality should be presumed as a result of his selection by the other arbitrators, is unlikely to respect preconceived positions tenaciously embraced by a biased party-arbitrator or to bond with him as he may with an unbiased arbitrator who shares the common goal of making the right decision for the right reasons.

The IBA's guidelines create three categories for determining whether a conflict of interests exists for an arbitrator – the red, orange and green lists. The red list signifies the types of relationships that will disqualify an arbitrator, but because some (but not all) of these conflicts may be waived by the parties the list is further subcategorized into waivable and nonwaivable relationships. The green list defines relationships that will not disqualify a candidate, and the orange list cites common situations that may (but not necessarily) give rise to justifiable doubts about an arbitrator's impartiality or independence.

Some arbitral rules also require 'neutrality', meaning a sole arbitrator or a tribunal's chairman cannot have the same nationality as a party unless the parties agree otherwise. The UNCITRAL rules comment on "the advisability of appointing an arbitrator of a nationality other than the nationality of the parties" as a consideration, and other institutions have similar provisions within their rules.

At least six criteria should be considered when selecting an arbitrator: integrity, intelligence, attention to detail, personality and stature, expertise, and general predisposition. Integrity and intelligence are obvious criteria. A party wants someone who will not tolerate untoward influences on the tribunal and who is sufficiently intelligent and knowledgeable to be able to reach the right decision for the right reasons. Since 'knowledge is power' in the tribunal's deliberations, it is very important to select an arbitrator who will read the documents and analyse the case carefully. It is also important to appoint an arbitrator who is articulate and has the personality, and perhaps stature, that would be persuasive with the third arbitrator. Expertise in the subject matter of the dispute or in the applicable law may be helpful, but is not always necessary; however, one should not generally sacrifice the first four criteria for expertise. Parties usually prefer someone who has a general predisposition toward their case, and this is not objectionable so long as the arbitrator meets the requirements of impartiality and independence.

Parties should also take into account important practical considerations. Depending on the circumstances, nominees should be comfortable with different cultures, legal

systems, languages and the arbitral process in general. In most instances, he or she should be an experienced lawyer with a good judicial demeanor and familiarity with international relations in order to resolve the difficult legal, cultural and even emotional issues that sometimes arise in a hard-fought arbitration, in which large amounts of money and national pride may be at stake. Knowledge of the language agreed upon by the parties or the languages of the contract and key documents is also necessary.

Disclosure of background information

Candidates for appointment have a continuing obligation to disclose to the parties all potentially relevant relationships, engagements or financial ties to enable the parties to evaluate a nominee's suitability. Although parties have independent means of researching a candidate's professional background through public sources and by interviewing parties and counsel who may have appeared before that candidate in other matters, there is no substitute for a complete disclosure by the candidate of all information, personal and professional, that is relevant to the criteria of impartiality and independence. Full disclosure also avoids the risk of a later challenge, because a party will usually be deemed to have waived the right to object, if it fails to raise its objection immediately following disclosure.

Interviewing the candidate

Parties often seek to interview a potential arbitrator to assess his suitability to serve because a candidate's disclosures can leave legitimate questions unanswered. Interviews also provide an opportunity to evaluate a candidate's health, intelligence, experience, language capabilities and availability. Such interviews are permissible so long as the merits of the case are not discussed in detail.

The trend, however, is to circumscribe the scope of such interviews to avoid even an appearance of impropriety. Parties or their counsel should not use these interviews either to present their arbitration arguments or to commit a candidate to the nominating party's position, nor present legal or factual arguments beyond the minimal communications necessary to enable the candidate to understand the general nature of the case and make the necessary disclosures. For example, counsel should neither provide copies of pleadings or briefs nor discuss how a candidate views a particular issue related to the dispute. Most institutional rules ban such interviews, although interestingly, the Santiago CAM's rules bar communications with "an arbitrator or candidate for arbitrator in relation to the case unless the other

party or parties are present," except when discussing the general nature of the dispute and the procedure or asking the candidate about his traits, availability, independence and impartiality. Subject to the applicable arbitration rules or local arbitration law, what counsel may discuss with a candidate may include:

- the identities of the parties, counsel and witnesses;
- the estimated timing and length of hearings;
- a brief description of the general nature of the case sufficient to allow the candidate to determine if he is competent to decide the dispute, has disclosures to make, and has the time to devote to the matter;
- the arbitrator's background, qualifications and CV;
- the arbitrator's published articles and speeches;
- any expert witness appearances of the arbitrator, including positions taken;
- any previous service as an arbitrator, including decisions rendered to the extent they are published;
- if anything in the arbitrator's background would raise justifiable doubts as to his independence or impartiality, and any disclosures that the arbitrator would need to make;
- whether the arbitrator feels competent to determine the parties' dispute; and
- the availability of the arbitrator (ie, whether he can devote sufficient time and attention to the parties' dispute in a timely manner).

To avoid issues, some candidates impose individualised guidelines governing the interview process and may even take notes to provide to interested parties thereafter to make clear what the guidelines were and what topics were discussed. Again, the purpose is to instil confidence in the fairness of the process and avoid any appearance of partiality.

Other than this pre-appointment interview, ex parte communications are generally prohibited, except that a party may communicate with its appointed arbitrator during the process of (and solely to discuss) the party-appointed arbitrators' selection of the third arbitrator.

In summary, the rules governing the appointment process are designed to ensure a level playing field and preserve both the perception and reality of a fair and even-handed arbitral process. The remarkable growth of arbitration as a voluntary method of resolving disputes is a testament to the efficacy of these procedures.